



Date: February 10, 1998

Case No. 97-INA-161

In the Matter of:

BARBARA CHAMBERS CHILDREN CENTER,
Employer,

on behalf of

ESTER LAMNYAN,
Alien.

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification.¹ Employer is a day care center. It is disputed in this matter whether the position Employer is seeking to fill is "Teacher, Preschool" (D.O.T. Code 092.227-018) or "Nursery School Attendant" (DOT Code 359.677-018).

In its ETA 750A, Employer listed the job title as "Teacher," and required a BS degree or equivalent in Computer Science, two years of experience, and the ability to speak both French and English. (AF 48) The job duties are listed as:

NURSERY SCHOOL ATTENDANT - ORGANIZES AND LEADS ACTIVITIES OF
PREKINDERGARTEN CHILDREN IN NURSERY SCHOOL: HELPS CHILDREN

¹ The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(C).

REMOVE OUTER GARMENTS. ORGANIZES AND PARTICIPATES IN GAMES, READS TO CHILDREN, AND TEACHES THEM SIMPLE PAINTING, DRAWING, HANDWORK, SONGS, AND SIMILAR ACTIVITIES. DIRECTS CHILDREN IN EATING, RESTING, AND TOILETING. HELPS CHILDREN DEVELOP HABITS OF CARING FOR OWN CLOTHING AND PICKING UP AND PUTTING AWAY TOYS AND BOOKS. MAINTAINS DISCIPLINE [SIC]. MAY SERVE MEALS AND REFRESHMENTS TO CHILDREN AND REGULATE REST PERIODS. MAY ASSIST IN PREPARING FOOD AND CLEANING QUARTERS.

(AF 48) The job was advertised and posted as for a "pre-school teacher". (*see* AF 54, 55) Employer's recruitment report indicates that it had been unable to contact any of the seven U.S. applicants at the telephone numbers they provided. (AF 53)

In a Notice of Findings dated June 27, 1996, the CO proposed to deny certification on the ground that the job was properly categorized as DOT Code 359.677-018, Nursery School Attendant rather than DOT Code 092.227-018, Teacher, noting that the job duties described on ETA 750A were virtually identical to the DOT Code 359.677-018. In addition, the CO found that requirement of a BS degree or equivalent in Computer Science was unduly restrictive, and directed Employer to establish business necessity for the requirement. The CO also found that the educational requirement was beyond the Specific Vocational Preparation maximum of 3 to 6 months, and that several U.S. applicants were unlawfully rejected for not meeting these unduly restrictive requirements. Finally, the CO found that Employer had not adequately documented its rejection of the U.S. workers on the ground that it could not reach them by telephone; the CO observed that Employer should have tried alternative means of contact.

Employer submitted a rebuttal dated July 22, 1996, arguing that it really needs a pre-school teacher, and not an attendant; that the DOT Code 092.227-018 contains much the same information as does the description of attendant; that Federal regulations prohibit Employer from hiring attendants (that a minimum of 15 college credit hours are required, and an internal decision was made to hire only individuals who have college degrees); that the Computer Science degree is necessary because part of the instruction is exposure to computers; that Employer tried to call each applicant who submitted a resume, left messages on their answering machines, but did not receive a return call from any applicant. (AF 34-36) Employer recontacted the applicants — this time with considerably more success — but those who were contacted were either not interested or did not have the requisite computer skills. (AF 37-38)

The CO issued a Final Determination denying labor certification on December 4, 1996. (AF 28-33) The CO did not change his determination that the position was actually for a nursery school attendant because the job duties, and not the title Employer chooses to use, determine the DOT; found that the job duties did not reflect any education of the children in computers, and even if such a duty was listed, a degree in computer science would still be unduly restrictive for instruction at the pre-school level; that the 4-year college degree was unduly restrictive (finding that 15 credit hours are not the equivalent of a 4-year degree, and that Employer's decision to

require a college degree did not establish business necessity); that some of the U.S. applicants were unlawfully rejected based on the unduly restrictive job requirement of a college degree in computer science; that it was Employer's obligation to try alternative means of contact if a telephone contact was unsuccessful.

Employer requested review in a letter dated December 15, 1996. (AF 1-27) Employer argued that a local code description of teacher was similar to both the DOT description of Pre-School Teacher and Nursery School Attendant, and that in designing the job description for its labor certification, Employer stated the duties it expected teachers in its facility to perform. (AF 2-3) Employer also attached to the request for review a document entitled "The PreSchool & Daycare Guide". (AF 6-27)

Discussion

The regulations governing alien labor certification provide that the request for administrative-judicial review "shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *University of Texas at San Antonio*, 88-INA-71 (May 9, 1988). In this case, the document entitled "The Preschool & Daycare Guide" was not part of the record made before the CO, and is not properly considered by this Board on review.

We find no error in the CO's categorization of Employer's position as a nursery school attendant. While we agree that there are similarities between the description of the duties of a preschool teacher and a nursery school attendant, we find Employer's argument that it just happens that these job duties stated on the ETA 750A are what are required of teachers in its facility to lack credibility. Employer's description of the job is, except for an irrelevant clause about coverage of organizations other than nursery schools, a verbatim recital of DOT 359.677-018.² Employer has described a nursery school attendant.

²The DOT Code descriptions at issue here are quoted below:

**359.677-018 NURSERY SCHOOL ATTENDANT (any industry) alternate titles:
child-care leader; child-day-care center worker; day care worker**

Organizes and leads activities of prekindergarten children in nursery schools or in playrooms operated for patrons of theaters, department stores, hotels, and similar organizations: Helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting, and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in preparing food and cleaning quarters.

We also affirm the CO's finding that the bachelor's degree requirement is unduly restrictive. A bachelor's degree requirement not only exceeds the SVP for a Nursery School Attendant, but even exceeds the 15 credit hours requirement Employer claims is required by Federal law. Employer states that it made an internal decision to require a college degree; but this statement standing alone does not articulate business necessity for the requirement. Moreover, Employer never provided a citation for the Federal law it claims governs the requirements for hiring relating to Employer's position.

Also, regardless of whether this job is properly described as pre-school teacher or as nursery school attendant, we affirm the CO's finding that the requirement of a degree in computer science is unduly restrictive and was not justified by business necessity. Employer argues that it will introduce pre-schoolers to computers. It has not explained why the level of instruction given to the preschoolers, however, requires the instructor to have a college degree in computer science. *See Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*) (employer show both that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) *that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer*). Thus, we also affirm the CO's finding that U.S. applicants were unlawfully rejected for not having computer science degrees.

Finally, we also affirm the CO's finding Employer engaged in inadequate efforts to contact applicants by alternative means. *See Any Phototype, Inc.*, 90-INA-63 (May 22, 1991)(an employer who does no more than making unanswered phone calls or leaving a message on an answering machine has not made a reasonable effort to contact the U.S. worker, where the

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092.227-018 TEACHER, PRESCHOOL (education)

Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school in preschool, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using play equipment. May be required to have certification from state. May be designated Teacher, Child Development Center (education); Teacher, Day Care Center (education); Teacher, Early Childhood Development (education); Teacher, Nursery School (education).

GOE: 10.02.03 STRENGTH: L GED: R4 M2 L3 SVP: 7 DLU: 81

addresses were available for applicants).³

Accordingly, the CO's denial of alien labor certification is AFFIRMED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

³Although the panel in *Any Phototype* indicated that a certified letter would have been a minimally acceptable additional effort, we do not decide in this decision whether additional efforts would required a *certified* letter. A minimal additional effort, however, would have been to attempt to contact applicants by mail.